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IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

No. ____

ELMO W. MCCLOUD, *Petitioner*

v.

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK), *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether, unlike federal law, an employee's right to a trial de novo in a state court in order to enforce his right to equal employment opportunity is lost when such an employee files his claim of discrimination with a state administrative agency before filing his claim with a state court?

2. Whether, unlike federal law, the doctrine of election of remedies has application in an employment discrimination context when an action is filed in a state court after a no probable cause finding by a state human right agency?

3. Whether the decision below denying Petitioner the opportunity to pursue a claim of racial discrimination in court, based upon a state court's decision decided after Petitioner filed his complaint in court, subjects him tc ex post facto law and denies him due process of law?

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v.

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK), *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

The Petitioner, Elmo W. McCloud, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the District of Columbia Court of Appeals entered in this proceeding on May 13, 1982.

OPINION BELOW

The Opinion of the Court of Appeals not yet reported, appears in the Appendix hereto. No opinion was rendered by the Superior Court for the District of Columbia.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on May 13, 1982. A timely petition for rehearing *en banc* was denied on August 2, 1982 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 1, Section 10, United States Constitution:

No state shall . . . pass any . . . expost facto law. . . .

Fifth Amendment, United States Constitution:

No person shall . . . be deprived of . . . liberty, or property, without due process of law. . . .

DISTRICT OF COLUMBIA CODE, Title 1:

§ 2556—

§ 1-2556. Private cause of action.

(a.) Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of competent jurisdiction for damages and such other remedies as may be appropriate, unless such person has filed a complaint hereunder: Provided, that where the Office has dismissed such complaint on the grounds of administrative convenience, or where the complainant has withdrawn a complaint, such person shall maintain all rights to bring suit as if no complaint had been filed. No person who maintains, in a court of competent jurisdiction, any action based upon an act which would be an unlawful discriminatory practice under this chapter may file the same complaint with the Office.

(b.) The court may grant such relief as it deems appropriate, including but not limited to, such relief as is provided in § 1-2553(a).

STATEMENT OF THE CASE

Petitioner was employed as an On-Board Service Director for AMTRAK from March, 1973 to February, 1980. While serving in late 1979 as a witness for the company in a hearing before the District of Columbia Office of Human Rights, Petitioner discovered that he was hired in 1973 at a salary of $2,000.00-$4,000.00 less than all similarly situated white On-Board Service Directors hired in 1973. Petitioner had substantial prior railroad experience before coming to AMTRAK

and received only above average and superior performance ratings during his employment with AMTRAK.

Petitioner filed a charge of discrimination with the District of Columbia Office of Human Rights (OHR), in January, 1980, alleging that he was paid substantially less than the salary of similarly situated white On-Board Service Directors because of his race (black). On January 29, 1980, OHR held a fact-finding conference at its office in Washington, D.C. At this fact-finding conference, Petitioner questioned the propriety of OHR's investigation and requested its investigator to withdraw from further involvement in his case. Petitioner's request was followed by a letter dated February 1, 1980, from counsel for Petitioner, to the Director of OHR requesting an impartial investigator for his case.

Petitioner was not notified until Feburary 25, 1980 by OHR that it had found no improprieties in the processing of his charge of discrimination against AMTRAK. Petitioner nor his counsel was contacted by OHR during its asserted investigation of Petitioner's complaint of improprieties by the OHR investigator. On March 14, 1980, Petitioner requested OHR to waive its jurisdiction over his charge of discrimination in order to permit the Equal Employment Opportunity Commission (EEOC) to investigate his complaint against AMTRAK.

By letter dated April 21, 1980, OHR informed Petitioner for the first time that a determination had been made in his case. OHR also informed Petitioner that it would not waive its jurisdiction over his charge. The no probable cause determination letter from OHR was dated February 28, 1980. However, Petitioner was not informed of this fact until he received the April 21, 1980 letter from OHR. The April 21, 1980 letter informed Petitioner that he may "petition the Court without prejudice if you wish to pursue this complaint."

Petitioner filed a suit in the Superior Court of the District of Columbia on July 25, 1980 against AMTRAK alleging a violation of the District of Columbia Human Rights Act of 1977, Title VII of the Civil Rights Act of 1964, as amended, and 42

USC § 1981. On August 27, 1980, AMTRAK removed Petitioner's complaint to the United States District Court for the District of Columbia. In the District Court AMTRAK admitted that Petitioner was paid less than all white On-Board Service Directors hired by AMTRAK in 1973; however, AMTRAK alleged that Petitioner's complaint was time barred and that the Superior Court did not have jurisdiction over the complaint.

Petitioner filed his Motion to Remand his Complaint to the Superior Court on September 10, 1981. After the United States District Court dismissed Petitioner's Title VII and Section 1981 claims against AMTRAK, it granted Petitioner's Motion to Remand to the Superior Court of the District of Columbia pursuant to the D.C. Human Rights Act of 1977 on March 6, 1981. In the Superior Court, AMTRAK filed a Motion to Dismiss the complaint, contending that (1) the court lacked jurisdiction since Petitioner had filed a complaint with OHR, and (2) that the action was time barred. The Superior Court dismissed Petitioner's Complaint because he had previously filed a charge with OHR.

Petitioner filed an appeal from the Superior Court dismissal of his complaint with the District of Columbia Court of Appeals. The Court of Appeals affirmed the order of the Superior Court dismissing Petitioner's Complaint. The Court of Appeals found that "The jurisdiction of the Superior Court and the jurisdiction of the OHR are mutually exclusive." See p. 2a of Appendix hereto. Further, the Court of Appeals held that Petitioner "Having filed his complaint with the OHR, [Petitioner] is thus precluded from bringing the same action in Superior Court." *Id* at 3a.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is At War With Decisions Of This Court And Federal And Local Legislative Enactments Which Have Long Manifested A General Intent To Accord Parallel Or Overlapping Remedies Against Discrimination

This case concerns the proper relationship between Federal courts, state courts, and federal and state administrative agencies in the resolution and enforcement of an individual's right to equal employment opportunities under a state's human rights law. The problem presents an opportunity for this Court to decide the role of state civil rights agencies and state courts while enforcing the strong federal policy against racial discrimination. Simply stated, the issue presented is under what circumstances, within the context of federalism, is an employee's statutory right to a trial de novo under the Human Rights Act of 1977 foreclosed by prior submission of his claim to the Office of Human Rights.

The decision below rejected petitioner's position that he was entitled to a trial de novo in the state trial court on his claim of racial discrimination in employment after he was advised by the Director of the District of Columbia Office of Human Rights to pursue his claim in court. The District of Columbia Court of Appeals held that the jurisdiction of the Office of Human Rights (OHR) and the jurisdiction of the Superior Court of the District of Columbia are mutually exclusive. (See Appendix p. 2a). The District of Columbia Court of Appeals relied exclusively on its holding in *Brown* v. *Capitol Hill Club*, DC App, 425 A2d1309, 1311 (1981). Both holdings, however, are predicated on the election of remedies doctrine and are in direct conflict with this Court's holdings in *Alexander* v. *Gardner Denver Co.*, 415 U.S. 36 (1974), and *Chandler* v. *Roudebush*, 425 U.S. 840 (1976).

In *Alexander* v. *Gardner Denver*, *supra*, this Court rejected the election of remedies doctrine as having no application in an employment discrimination context. This Court found that "legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against dis-

crimination." 415 US at 47. This Court adopted this view because "Congress indicated that it considered the policy against discrimination to be of the "highest priority." *Id.* Therefore, "submission of a claim to one forum does not preclude a later submission to another." *Id.* Later, in *Chandler* v. *Roudebush, supra,* this Court extended its holding in *Alexander* v. *Gardner Denver Co., supra,* requiring a trial de novo to federal employees. After reviewing the legislative history of the 1972 amendments to Title VII,[1] this Court found that "the legislative history reinforce[d] the plain meaning of the statute . . . that Congress intended to accord federal employees the same right to a trial de novo as is enjoyed by private-sector employees and employees of state governments and political subdivisions" under the amended Civil Rights Act of 1964. 425 US at 848.

The holdings of the District of Columbia Court of Appeals, in the instant case, and in *Brown* v. *Capitol Hill Club, supra,* that the District of Columbia Human Rights Law requires an election of remedies between the filing of a complaint of employment discrimination with the Office of Human Rights or in Court are in conflict with the intent of Congress and the intent of the Council of the District of Columbia which considered the policy against discrimination to be of the "highest priority." This high priority was intended to provide for the consideration of employment discrimination claims in several forums.[2] 415 US at 47.

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[1] 42 U.S.C. 2000e *et seq.*

[2] In the legislative history which accompanied the re-enactment of the District of Columbia Human Rights Law, adoption of this strong federal view is underscored: "Enactment of Title 34's provisions as the "Human Rights Act' would underscore the Council's intent that the elimination of discrimination within the District of Columbia should have "the highest priority" (compare *Newman* v. *Piggy Park Enterprises,* 390 US 400, 402 (1968), and *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 47 (1974) and that the Human Rights Act should therefore read . . . as supplementing other laws of the District." See Appendix p. 7a.

In reaching a contrary conclusion, the District of Columbia Court of Appeals in *Brown* v. *Capitol Hill Club*, *supra*, relied—not upon the remedial purpose of the D.C. Human Rights Law—but upon the election of remedies doctrine as applied by the state courts of New York in two cases.

In *Allison* v. *School District*, 4 FEP cases 898 (N.Y. Sup. Ct. 1972), a school teacher filed a discrimination complaint with the State Division of Human Rights (equivalent to the D.C. Office of Human Rights). After a hearing, the challenged regulation of the Board was found to be discriminatory. When the Complainant subsequently filed suit in court on the same claim, it was dismissed on the basis that complainant had made an election and was barred from proceeding in court. The District of Columbia Court of Appeals also relied upon another New York case adopting the election of remedies approach in employment discrimination. In *Tinawy* v. *Travelers Aid Society*, 20 FEP Cases 1507 (N.Y.Sup.Ct. 1977), the State Commission of Human Rights affirmed a no probable cause finding of the Regional Director on a charge of employment discrimination by an employee against his former employer. The employee subsequently filed an action in court against his employer alleging breach of contract. The court dismissed the action based on § 297[9] of the N.Y. Human Rights Law.[3] Based on § 279[9], the court in *Tinawy*, *supra*, found that:

> The statute makes it plain a person aggrie ed was to have only one bite of the apple. He is free to choose the administrative route or judicial route. He cannot run both courses.

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[3] "(9). Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages and such other remedies as may be appropriate, unless such person had filed a complaint hereunder or with any local commission on human rights, provided that where the division has dismissed such complaint on the grounds of administrative convenience, such person shall maintain all rights to bring suit as if no complaint had been filed. No person who has initiated any action in a court of competent jurisdiction or who has an action pending before any administrative agency under any other law of the state

In adopting this harsh election of remedies approach, the District of Columbia Court of Appeals relied upon the above cases from New York in *Brown* v. *Capitol Hill Club*, *supra*, and held:

> "We find the District of Columbia statute similarly, provides alternative avenues of redress, administrative or judicial. Having opted the administrative route, appellant was barred from bringing the same action in court. Accordingly, the trial court did not err by dismissing the action taken." *Id.* at 1313

This holding was followed in the instant case when the District of Columbia Court of Appeals held that petitioner having "filed his complaint with the OHR, appellant is thus precluded from bringing the same action in Superior Court. . . . Therefore, the trial court did not err in dismissing his complaint." Appendix at p. 3a.

Prior to the District of Columbia Court of Appeal's decision in *Brown* v. *Capitol Hill Club*, *supra*, the D.C. Court of Appeals had construed the Human Rights Law as not precluding an action in court after filing a complaint with the Office of Human Rights. In *Mendota Apartments* v. *District of Columbia Commission on Human Rights*, DC App, 315 A2d 832 (1977), the D.C. Court of Appeals held that:

> "Thus an injured party is not precluded by filing a complaint with the Office of Human Rights from seeking a civil remedy, including an action for damages, in the courts."

Prior to the decision in *Brown* v. *Capitol Hill Club*, *supra*, the *Mendota Apartment* case was the only guidance that victims of discrimination in the District of Columbia had to rely upon concerning the proper interpretation of the D.C. Human Rights Law when filing claims with the courts. It was this *Mendota Apartment* case and instruction from the Director of

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based upon an act which may be an unlawful discriminatory practice under this article, may file a complaint with respect to the same grievance under this section." (N.Y. Human Rights Law (Executive Law § 279[9] (McKinney, 1972).

the Office of Human Rights in which Petitioner relied when he withdrew his complaint from the Human Rights agency and filed an action with the Superior Court of the District of Columbia.

It is significant to note that Petitioner withdrew his complaint from OHR in protest over what he considered to be improper and prejudicial conduct by the investigator of his complaint against AMTRAK. And, in response to Petitioner requests to withdraw his complaint from OHR, the Director informed Petitioner that he may "petition the Court without prejudice" if he wished to pursue his complaint against Amtrak further.[4]

This instruction to Petitioner is consistent with the legislative scheme set out in the Human Rights Law. This law provides a bipartite agency to investigate and hear complaints of discrimination. The Office of Human Rights is charged with the responsibility by the Act of accepting complaints of discrimination, investigating complaints of discrimination, and endeavoring to eliminate unlawful discriminatory practices by "conference, conciliation or persuasion." § 2286. The Commission on Human Rights sits as the hearing tribunal to make determination upon such complaint where there has been a finding by the Office of Human Rights of probable cause. § 2290 and § 2291. Such hearings by the Commission are to be conducted pursuant to the D.C. Administrative Procedure Act. And, if, at the conclusion of a hearing, the Commission determines that a respondent has violated the Act, it is empowered to issue a decision or order, accompanied by findings of fact, and conclusions of law, requiring such respondent to cease and desist from such unlawful discriminatory practice. § 2293. The Commission is also empowered to take such affirmative action, including, but not limited to, the hiring, reinstatement or upgrading of employees, with or without back pay, among other things. § 2293. The Human Rights Law

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[4] OHR's April 21, 1980 letter. See note 8, *infra*.

provides for review of a Commission's decision or order in the District of Columbia Court of Appeals. § 2294.

From the above, it is clear that the Human Rights Law contemplates the activities of OHR to be that of mere investigation and conciliation of complaints of unlawful discriminatory practices.[5] And, that the hearing tribunal empowered to conduct hearings and issue decisions and orders for relief from unlawful discriminatory practices is the Commission on Human Rights.[6] That the Office of Human Rights is limited to efforts at conciliation is manifested in § 2292(d) where it is stated: "Efforts at conciliation by the Office, or the parties, shall not be received in evidence." Thus, it is clear that efforts at conciliation by OHR were not intended to have res judicata effect, and the Director correctly advised Petitioner to file with the court.

In fact, the D.C. Human Rights Law and Title VII of the Civil Rights Act, contemplated "private attorney generals" enforcement by the victims of discriminations.[7] Section § 2287 provides for injunctive relief by appropriate civil action to prevent irreparable harm upon certification by the OHR to the Corporation Counsel. This section further provides that the appropriate parties shall be notified of such certification and the complainant may initiate independently, or in cooperation with the Corporation Counsel, appropriate civil action to seek injunctive relief to preserve the status quo. Such a provision is inconsistent with a finding of election of remedies while the matter is simply before the OHR. The Human Rights Act does not provide the Office of Human Rights with any direct powers of enforcement. OHR cannot adjudicate claims or impose ad-

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[5] Compare Sections §§ 2284, 2285, and 2286.

[6] Compare §§ 2292 and 2293.

[7] See legislative history to D.C. Human Rights Law, Appendix p. 6a. This Court may take judicial notice of the legislative history of the Human Rights Law pursuant to 1 D.C. Code § 1605. This section provides: "All courts within the District of Columbia shall take judicial notice of the acts and resolutions published in the District of Columbia Statutes-At-Large.

ministrative sanction. Rather, final responsibility for enforcement of the Human Rights Act is vested with the courts (*cf. Alexander* v. *Gardner Denver Co.*, 415 US at 44) or the Commission on Human Rights where there has been a finding of probable cause by the OHR. The Act provides for the enforcement activities of the Commission only after there has been a finding of probable cause by OHR. See § 2290. Surely, a no probable cause finding by the OHR should not bar a victim of discrimination from filing an independent de novo action in court, when he has no right under the Act to appeal a no probable cause finding to the Commission itself.

In *McDonnell Douglas* v. *Green*, 411 US 792, 798, 799 (1973), this Court held, when construing Title VII of the Civil Rights Act of 1964, as amended, as follows:

> "The Act does not restrict a complainant's right to sue to those charges as to which the Commission has made findings of reasonable cause, and we will not engraft on the statute a requirement which would inhibit the review of claims of employment discrimination in the federal courts: The Commission itself does not consider the absence of a "reasonable cause determination as providing employer immunity from similar charges in a federal court, 29 CFR 1601.30, and the Courts of Appeals have held that, in view of the large volume of complaints before the Commission and the nonadversary character of many of its proceedings "court actions under Title VII are de novo proceeding . . . a commission's no reasonable cause findings does not bar a lawsuit in the case." *Id.* at 798-99.

State agencies and state courts should not be allowed to fall below this minimum standard of review.

In the instant case, Petitioner was advised by the Director of the Office of Human Rights to pursue his claim in "court without prejudice."[8] It is clear from the Director's right to sue

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[8] In pertinent part the letter from the Director stated:

"In reply to your most recent request that this Office waive jurisdiction in the above captioned complaint to the Equal Employment Opportunity Commission, please be advised that we retain local

letter that she believed that Petitioner was entitled to maintain his action in court and that an OHR no probable cause determination was not a bar to a lawsuit. *cf. Coles* v. *Penny*, 174 App DC 277, 531 F2d 832 (1974) and *Mendota Apartment* v. *District of Columbia Commission on Human Rights, supra. See also, Beverly* v. *Lone Star Lead Construction Corp.*, 431 F2d 1136 (4th Cir. 1971); *Robinson* v. *Lorilland Corp.*, 444 F2d 791 (4th Cir. 1971); *Fekete* v. *United States Steel Corp.*, 424 F2d 331 (3rd Cir. 1970) and *Flowers* v. *Local 16, Laborers International Union of North America*, 431 F2d 205, (3rd Cir. 1970).

ELECTION OF REMEDIES

The purpose and procedures of the Human Rights Law of the District of Columbia strongly suggest that an individual does not forfeit his private cause of action against an unlawful discriminatory employment practice if he first files his complaint with the Office of Human Rights and subsequently files an action in the Superior Court upon advise of the Director of the OHR. In reaching the opposite conclusion the District of Columbia Court of Appeals misapprehended or ignored the holdings of this Court in *McDonnell Douglass* v. *Green, supra*, and *Alexander* v. *Gardner Denver Co., supra*, and mistakenly relied upon the election of remedies doctrine as imported from New York.

The cases from New York are distinguished from the instant case at bar. In the first New York case *Allison* v. *School District, supra*, the State Division of Human Rights made a

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jurisdiction in this matter, that the EEOC has reviewed our investigative files and finding, and that it has concurred in our No Probable Cause determination.

You may petition the Court without prejudice if you wish to pursue this complaint. . . . (Letter from Director of OHR to Counsel for Petitioner dated April 21, 1980).

probable cause finding in favor of the complainant and a suit was subsequently filed in court based on the same claim. Although the court dismissed the action on basis of election of remedies, it appears that the true basis for dismissal was an estoppel. This was because there had been a probable cause finding by the state agency and relief was available from the Commission itself.

The second New York case, relied upon by the District of Columbia Court of Appeals, was *Tinawy* v. *Travelers Aid Society, supra.* In the *Tinawy* case, the complainant appealed his no probable cause finding of the Regional Director of the State Commission on Human Rights (equivalent to the Office of Human Rights) to the Commission on Human Rights (equivalent to the D.C. Commission on Human Rights) itself where a final determination of no probable cause was affirmed. Thereafter, the complainant in the *Tinawy* case brought an independent action in the trial court based on breach of contract, not discrimination as was filed with the State Commission on Human Rights. However, the court dismissed stating: "An issue once finally decided is forever foreclosed." 20 FEP Cases 1507

The instant case at bar is different and clearly distinguishable from both cases, as cited in *Brown* v. *Capitol Hill Club, supra.* There was *no final determination* by the Commission on Human Rights in the instant case. There was not a probable cause finding by the Office of Human Rights pursuant to the D.C. Human Rights Law. *cf.* § 2290. Petitioner McCloud was not aware that a no probable cause finding had been made by the Office of Human Rights in his case when he requested the OHR to withdraw its jurisdiction over his complaint. Petitioner McCloud alleged improper conduct by OHR in the investigation of his complaint. Petitioner McCloud did not appeal his no probable cause finding by the OHR to the D.C. Commission on Human Rights. Petitioner McCloud's action in court was under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981, 1985 and the 13th and 14th amendments to the United States Constitution. Petitioner McCloud was advised by the

Director of OHR to file an action in court without prejudice. Petitioner's action in court was filed about one year before the District of Columbia Court of Appeals issued its decision in *Brown* v. *Capitol Hill Club, supra.* Finally, Petitioner relied upon the District of Columbia Court of Appeals ruling in *Mendota Apartment* v. *D.C. Commission on Human Rights, supra,* which was decided before *Brown* v. *Capitol Hill Club,* and adopted by the Council of the District of Columbia in the legislative history which accompanied the re-enactment of the D.C. "Human Rights Act of 1977."[9]

To foreclose Petitioner's right to maintain this action, in the circumstances of this case, would be to deny him the right to a fair and impartial investigation by the Office of Human Rights and the right to be heard by either the Commission on Human Rights or a court, while granting Amtrak immunity from its admitted discrimination against Petitioner.[10] This is plainly repugnant to fundamental due process notions. *See, Macklin* v. *Spector Freight System, Inc.*, 478 F2d 979, 991 (D.C. Cir. 1973). The finality accorded in the New York cases should not be extended in the present case, especially because the fairness of OHR's investigation procedures was profusely questioned by Petitioner.

Petitioner has not had his day in court.

II. The Election Of Remedies Doctrine Has No Place In An Employment Discrimination Context

The election of remedies doctrine has been widely criticized by the courts.[11] One of the principal criticism of the doctrine has been its tendency to serve as an instrument of injustice and

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[9] *See* Appendix, p. 6a.

[10] Amtrak admitted in its Answers filed in the United States District Court and in the Superior Court that Petitioner was paid less than all white On-Board Service Directors hired by Amtrak in 1973.

[11] *See generally,* Election of Remedies, 25 *AmJur* 2d § 1-35.

oppresion.[12] This unfairness is especially apparent in those cases, as the instant case at bar, where the unsuccessful invocation of a remedy, i.e., the election of a remedy that turns out to be unavailable is held to bar the subsequent enforcement of another remedy.[13]

The election of remedies doctrine has been characterized as harsh, and is disfavored in equity.[14] It should not be lightly enforced or unduly extended.[15] This Court has recognized in *Alexander* v. *Gardner Denver Co.*, 415 US at 47, that legislative enactments in the area of employment discrimination have long demonstrated a "general intent to accord parallel or overlapping remedies against discrimination." This Court has found that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination.[16] After reviewing the purpose and procedures of Title VII, this Court found that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement.[17] The Council of the District of Columbia adopted the reasoning of this court in *Alexander* v. *Gardner Denver Co.*, *supra*, when it re-enacted the "Human Rights Act of 1977." Therefore, the policy reasons for rejecting the election of remedies doctrine, in the employment discrimination context of Title VII, are equally applicable to the Human Rights Act of 1977.

There is no necessary inconsistency between allowing a victim of racial discrimination to pursue remedies before the

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[12] *Id.*

[13] *Id.*

[14] *Friederichsen* v. *Renard*, 247 US 207 (1918).

[15] *Id.*

[16] 415 US at 48, 49. Also, see generally A. Corbin, 5A, *Contracts*, § 1214-1227 (1971 ed). "If it were believed to be sound policy, the law could give many remedies for the same thing." *Id.* p. 472, § 1221.

[17] 415 US at 49.

Office of Human Rights and the Superior Court of the District of Columbia. For example, an individual's cause of action is not barred by an EEOC finding of no reasonable cause to believe that Title VII has been violated.[18] This is consistent with the high priority Congress indicated it considered the policy against racial discrimination.[19] The Council of the District of Columbia enacted the Human Rights Act to underscore its "intent" that the elimination of discrimination within the District of Columbia should also have the "highest priority."[20] An employer who commits an unlawful discriminatory practice should be ordered to make the victim of such unlawful discriminatory practice whole by the payment of backpay, reinstatement, attorney fees, and etc. There is no inconsistency in pursuing these remedies before OHR and the Courts. The victim may be made whole as a result of the OHR efforts to eliminate such unlawful discriminatory practice by "conference, conciliation or persuasion." If not, the victim should not be foreclosed from pursuing redress in state court. Therefore, the problem before the court is not one of logical consistency or inconsistency; it is a problem of history and a problem of policy. After having first determined that an unlawful discriminatory practice has occurred and that the employer has committed the unlawful discriminatory practice against the employee, the court's problem is to determine what various procedures and remedies the law provides in such a case to make the plaintiff whole and whether there is any inequity in the plaintiff's conduct which should estop the employee from pursuing all available remedies.

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[18] *See Alexander* v. *Gardner-Denver Co.*, 415 US at 48 n.8. *See also, McDonnell Douglas Corp.* v. *Green*, 411 US 792 (1973)

[19] See 415 U.S. at 47.

[20] *Id.* In addition, it is important to note that OHR is a 706 Agency within the comtemplation of Title VII. See 29 C.F.R. § 1601.74. Further, EEOC defers to 706 agencies before invoking its investigative powers over complaints of discrimination in employment pursuant to Title VII. See 29 C.F.R. § 1601.13. Clearly, the election of remedies doctrine should have no application within this federal context where the victim of discrimination has *no choice* but to file his complaint of discrimination initially with OHR. *Id.*

The purpose of all supposed rules as to election of remedies is never to deny a remedy to an injured party; such rules are for the purpose of preventing a double recovery for a single injury and to prevent multiple and vexations litigation.[21] This Court has recognized that the doctrine of election of remedies does not apply to suits under Title VII,[22] and the Petitioner requests that this Court give effect to the intent of the Council of the District of Columbia by holding that the doctrine of election of remedies does not apply in an employment discrimination context under the "D.C. Human Rights Act of 1977."

This is especially warranted in the circumstances of this case, where many of the same objections found by this Court wanting in the factfinding process during arbitration,[23] are present in the factfinding process before the Office of Human Rights. The record of the OHR investigation proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trial, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severly limited or unavailable. Moreover, most of the OHR investigators are not lawyers.[24] This case cries out for a remedy for the injustice which have been wrought by the election of remedies doctrine as applied below.

Furthermore, there is an inconsistency among the cases in the District of Columbia construing the Human Rights Act which should be resolved by this Court. In *Mendota Apartment* v. *District of Columbia Commission on Human Rights, supra* it was held that an injured party was not precluded from filing an independent action in the courts. However, in the instant case at bar, and in *Brown* v. *Capitol Hill Club, supra*, it was held that the election of remedies doctrine bars a subsequent action in Court under the Human Rights Act.

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[21] A Corbin, § 1220, 5A *Contracts* p. 471 (1971 ed).

[22] *Alexander* v. *Gardner-Denver, supra*.

[23] *Id.* at 57, 58.

[24] *Id.*

The decisions of the District of Columbia Court of Appeals in the instant case and in *Brown* are inconsistent with this Court's ruling in *Alexander* v. *Gardner-Denver*, *supra* and with *Macklin* v. *Spector Freight System, Inc.*, *supra*, a case decided by the United States Court of Appeals for the District of Columbia Circuit, which rejected the application of the election of remedies doctrine in an employment discrimination context. This Court should rule squarely that this election of remedies doctrine is inconsistent with the national policy against discrimination and has no application in an employment discrimination context.

These inequities and inconsistencies justify the grant of certiorari to review the judgment below.

III. The Decision Below Denied Petitioner His Constitutional Rights To Due Process Of Law And Freedom From Ex Post Facto Law.

The District of Columbia "Human Rights Act of 1977" permits a complainant who has filed an initial complaint with the Office of Human Rights to file an action in Court upon the happening of one of two events: (1) where the OHR dismisses a complaint on grounds of administrative convenience or (2) where the complainant withdraws his complaint before an administrative decision is rendered. *See*, *Brown* v. *Capitol Hill Club*, *supra* at 1312.

In the instant case, Petitioner requested OHR to withdraw the assigned investigator from his case due to improprieties in the investigation of his complaint. After OHR refused to withdraw the biased investigator from his case, Petitioner requested OHR to withdraw its jurisdiction from his case in order that EEOC may complete the investigation of his complaint of racial discrimination. Petitioner's request to withdraw his case from OHR was mailed on March 14, 1980. Petitioner was not informed that OHR had rendered a no probable cause finding in his case until April 21, 1980. It was in this letter that Petitioner was informed that he "may petition the Court without prejudice" if he wished to pursue his complaint further.

It is important to note that the no probable cause determination letter was dated February 28, 1980. However, Petitioner did not receive this letter. Petitioner was only informed that a no probable cause determination had been rendered in his case when he received the letter from the Director of OHR dated April 21, 1980. Although Petitioner raised this point in his Opposition[25] to Amtrak's Motion to Dismiss in the trial court, the District of Columbia Court of Appeals erroneously stated in its Opinion below as follows:

> "Appellant contends that he should have been permitted to maintain an action in Superior Court since he had asked the OHR to waive its jurisdiction before he was notified of the no probable cause determination. Appellant, however, failed to raise this notice issued before the trial court and is consequently barred from raising the issue on appeal. Furthermore, he failed to withdraw his complaint from the OHR before the agency's disposition." See Appendix pp. 2a-3a.

Petitioner brought this matter to the attention of the District of Columbia Court of Appeals in his "Petition for Rehear-

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[25] In "Plaintiff's Points and Authorities in Opposition to the Defendant's Motion to Dismiss," submitted in the Superior Court below, Petitioner argued at pages 6 and 7 thusly:

> "Moreover, plaintiff is entitled to pursue his complaint of racial discrimination in the Superior Court because after the plaintiff requested the Office of Human Rights to waive jurisdiction of his complaint to permit the Equal Employment Opportunity Commission to investigate his complaint against Amtrak, the Office of Human Rights refused to *withdraw* its jurisdiction and permit the EEOC to investigate this matter.
>
> And, when the Plaintiff learned of the Office of Human Rights refusal to waive its jurisdiction in order that he may withdraw his complaint to the EEOC or to the Court for a *de novo* proceeding, a determination had already been made on his complaint.
>
> In light of the above efforts of the plaintiff to withdraw its complaint to another forum for a *de novo* determination prior to a decision by the Office of Human Rights, he is not barred under 6 D.C. Code 2296 from pursuing this lawsuit. Defendant's tenuous arguments in support of its motion to dismiss should be given a swift rejection." *Id.* (Footnotes omitted).

ing *En Banc*". However, the Court of Appeals, with three judges voting for a rehearing, denied Petitioner's request for a rehearing *en banc*. Petitioner maintains that he was denied his Constitutional Right to due process when the Court of Appeals refused to extend its equitable powers to avoid the injustice which he would suffer by not having a hearing after filing his claim in court upon advise of the Director of OHR.

The United States Court of Appeals for the District of Columbia Circuit has extended its equitable powers in similar situations in order to avoid an otherwise injustice in this important area of employment discrimination.

In *Bethel* v. *Jefferson*, 191 U.S. App D.C. 108, 589 F2d 631 (1978), equitable consideration was given when a party was not informed of the proper forum for an administrative resolution and therefore time barred from such proceeding, where OHR violated its own regulations requiring it to issue the party a right to sue letter with information regarding timeliness. In *Coles* v. *Penny*, 174 US App DC 277, F2d 609 (1976), equitable consideration was given where an agency failed to advise a party of the time limitations governing his right to appeal or his right to begin a civil action in court. In *Laffey* v. *Northwest Airlines*, 185 US App DC 322, 567 F2d 429 (1976), *cert. den.*, 434 U.S. 1086 (1978), equitable consideration was extended when some individuals within a class of plaintiffs were prejudiced by a trial court's notification and assumed that they need not do anything to join in any recovery which the court might order under a Title VII class action suit. *Id.* at 369, 567 F2d at 476.

The question before the court in the *Laffey* case was whether defendants were estoppel from asserting on appeal that claims from such plaintiffs who failed to file because they were misled by the trial court's notification should be dismissed for failure to meet the statutory time filing requirements. The court in *Laffey* held that it would be inconsistent with the remedial purpose of Title VII to foreclose recovery to such plaintiffs who relied on the trial court's notice. *Id.*

The trial court's order dismissing Petitioner's Complaint and the decision by the Court of Appeals below, are shockingly wrong and a blatant denial of due process. Both are inconsistent with the remedial purpose and articulated policy expressed in the "Human Rights Act of 1977." Only this Court can prevent the denial of Petitioner's due process rights as casually committed by the decisions below.

In addition, Petitioner maintains that the District of Columbia Court of Appeals refusal to credit his argument, concerning his reliance upon its ruling in *Mendota Apartment* v. *District of Columbia Commission on Human Rights, supra*, in filing his case with the Superior Court of the District of Columbia, before the Court of Appeals rendered its decision in *Brown* v. *Capitol Hill Club, supra*, was the application of an unconstitutional ex post facto law which denies him his due process rights protected by the Fifth Amendment to the United States Constitution.

Although the ex post facto principle in the Constitution does not usually apply to judicial retroactivity or changes in judge—made law, the principle on which the clause is based—the notion that persons have a right to fair warning of what action will give rise to loss of fundamental liberties and rights—is essential to our concept of constitutional liberty, and as such, is protected against judicial action by the due process clause of the Fifth Amendment. Cf. *Marks* v. *United States*, 430 U.S. 188 (1977). In fact, this Court has observed that an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Article 1 § 10, of the Constitution forbids.[26] This Court also has stated that if a state legislature is barred by the ex post facto clause from passing such a law, it must follow that a state Supreme Court is barred by the due process clause from achieving precisely the same result by judicial construction.[27]

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[26] *Bouie* v. *Columbia*, 378 U.S. 347 (1964).

[27] *Id.*

It has also been said that the fundamental principle that the required criminal law must have existed when the conduct in issue occurred must apply to bar retroactive criminal prohibition emanating from courts as well as from legislature.[28] This is especially significant in a case, such as the present case, where the District of Columbia Court of Appeals has *altered*[29] the intent of the Council of the District of Columbia in enacting the "Human Rights Act of 1977." This Court should find that where the judiciary has altered the intent of the legislature in passing a law, through its rule making power, such rules in their application to employment discrimination cases based on race violate the ban upon ex post facto laws when applied retrospectively to actions filed in court before such rules are issued, to the serious or substantial detriment of a victim of racial discrimination. Petitioner should not be left without a remedy.

He has acted reasonable and with due diligence.

Clearly, if the effect given § 2556 by the Court of Appeals is correct, then § 2556 is unconstitutional as applied to

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[28] *Id.*

[29] This is important because the Council of the District of Columbia was aware of the D.C. Court of Appeals holding in the *Mendota* case when it re-enacted the "Human Rights Act of 1977." If the Council desired to correct the *Mendota* holding, rejecting the election of remedies approach, it would have said so in the legislative history. Instead, the Council went to great length to underscore its intent to adopt this Court's reasoning and decision in *Alexander* v. *Gardner-Denver Co.*, *supra*, rejecting the election of remedies approach. *See*, Appendix pp. 6a-8a. Thus, it is clear that the Council did not intend to repeal the *Mendota* holding, rejecting the election of remedies approach; but wanted to underscore it by adopting this Court's reasoning in *Alexander* v. *Gardner-Denver*, *supra*. "The cardinal rule is that repeals by implication are not favored." *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, at 437 (1968).

Petitioner.[30] Petitioner should not be deprived of his right to be made whole for the discrimination he has suffered as a result of Amtrak's admitted wrongdoing. Nor should he be deprived of his day in court without a fair and impartial hearing on his claim of racial discrimination. This Court has repeatedly upheld it to be sound policy to have parallel or overlapping remedies against racial discrimination.[31] This principle should be extended in this case, especially in light of the well documented history of racial discrimination which exists in the railroad industry.[32]

The decision below interpreting § 2556 is repugnant to the Constitution of the United States.

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[30] *See generally*, Sullivan & Zimmer, *The South Carolina Human Affairs Law's Two Steps forward, One Step Backward*, 25 So. Car. L. Rev. 1, 37-79 (1974).

[31] *Alexander* v. *Gardner-Danver, supra; Chandler* v. *Roudebush, supra.* Compare note 16, supra.

[32] "The Negro is the only American railroad worker who the more he does the less he is paid." Charles Hamilton Houston, "Foul Employment Practice on the Rails." *The Crisis*, as quoted in Gilbert Ware's *From the Black Bar: Voices for Equal Justice*, p. 239, G. P. Putnam's Sons N.Y. 1976.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the District of Columbia Court of Appeals.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. ____

ELMO W. MCCLOUD, *Petitioner*

v.

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK), *Respondent*

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October, 1982, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Sozeen J. Mondlin, Esquire, 400 North Capitol Street, N.W., Washington, D.C., 20001. Counsel for the Respondent. I further certify that all parties required to be served have been served.

/s/ ROBERT L. BELL

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